No. 76-701

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN J. BRENNAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that federal narcotics agents violated the Fourth Amendment by searching his airplane without probable cause and a warrant.

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of importation of marijuana, in violation of 21 U.S.C. 952, and possession of marijuana, in violation of 21 U.S.C. 844. He was sentenced to six years' imprisonment on the importation count, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), followed by a special parole term of three years, and to one year's imprisonment on the possession count, to be served concurrently with the other sentence. The court of appeals affirmed (538 F. 2d 711; Pet. App. 1a-13a) and denied a petition for rehearing with suggestion of rehearing *en banc* (Pet. App. 15a).

The evidence adduced at the pretrial suppression hearing is detailed in the opinion of the court of appeals (Pet. App. 2a-4a). Briefly, it showed that on April 22, 1975, Agent Dennis Fitzgerald of the Drug Enforcement Administration was informed by Douglas Dufresne, a Pan American World Airways pilot, that petitioner "was going to engage in some smuggling activities into the Melbourne Regional Airport" (Pet. App. 2a). Agent Fitzgerald met with Dufresne shortly thereafter and learned that petitioner, Dufresne's former neighbor, was planning to use a 1969 twin engine aircraft with tail number N569MA, that the plane was kept in a hangar at the Melbourne airport, and that petitioner and Dufresne had been arrested in Colombia in November 1974 on suspicion of smuggling.[1] Dufresne also told the agent that he suspected that petitioner would soon install a 55-gallon auxiliary fuel tank in his airplane to enable him to fly to Colombia (about a 16 or 17 hour trip) without refueling and that the purpose of the trip would be to import almost a ton of marijuana. On April 28, 1975, Dufresne again contacted Agent Fitzgerald and informed him that he had recently spoken to petitioner and had inferred on the basis of several of petitioner's statements that the smuggling operation would take place within three weeks (Pet. App. 2a).

Agent Fitzgerald confirmed that an aircraft with number N569MA was located at the Melbourne Regional Airport and gave instructions to monitor its movement. At about 11:00 a.m. on May 17, 1975, he was notified that the aircraft had taken off, that it had headed in a southwesterly direction, and that radar contact with the plane had been lost after it had entered the Miami air

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[1]Agent Fitzgerald corroborated this arrest by checking with officials at the American Embassy in Bogota.

traffic pattern. Agent Fitzgerald contacted Customs officials for assistance, and Agents Ben Hays and Robert Miller were dispatched to the Melbourne airport (Pet. App. 3a). Near the hangar in which petitioner's airplane had been stored, the agents found an automobile and a van, both registered to petitioner.

At approximately 1:30 a.m. on May 18, 1975 (some 15 hours from the time petitioner's airplane had taken off), after the airport control tower had closed, the agents sighted petitioner's plane landing without its lights and taxiing toward its hangar. Shortly thereafter, petitioner was seen leaving the hangar and walking toward his nearby automobile. Upon encountering a police officer, petitioner abruptly changed his direction and headed back toward the hangar, where he was intercepted by the agents. Agents Hays then entered the hangar through its partially opened door and observed through the window of the airplane a number of tightly wrapped packages characteristically used to transport marijuana. The agent immediately searched the plane and found approximately 1,600 pounds of marijuana and 466 grams of hashish (Pet. App. 4a). As Dufresne had indicated, the plane was equipped with a 55-gallon fuel tank.

The district court denied petitioner's motion to suppress the evidence seized from the airplane, ruling that the Melbourne airport was the functional equivalent of the border and that the agents had reasonable cause to believe that petitioner's airplane had just arrived from outside the United States. The court of appeals affirmed, although it adopted a different rationale. The court concluded that "through a combination of hearsay information from the tip [from Dufresne], preflight corroboration of some of the details, and the on-the-scene corroboration of [petitioner's] surreptitious landing at the predicted time and place," the agents had probable cause to arrest petitioner and to search his airplane for the contraband (Pet. App. 10a).

1. Petitioner contends (Pet. 8-12) that the agents lacked probable cause because Dufresne's tip was insufficiently corroborated under the standards of *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. This claim is fully answered by the opinion of the court of appeals, upon which we rely (Pet. App. 10a-12a). Although the initial information about petitioner's smuggling activities had been furnished by a previously untested informant, an informant's reliability may be verified on grounds other than his past truthfulness. *United States* v. *Harris*, 403 U.S. 573, 581-582; *Spinelli* v. *United States*, *supra*, 393 U.S. at 416-417. Here, after a thorough review of the evidence, the court of appeals concluded that the agents had a substantial basis for crediting the informant. This determination, applying settled law to the facts of this case, does not warrant further review.

2. Petitioner's claim (Pet. 12-16) that the court of appeals erred in applying the so-called "automobile exception" to the warrant requirement is based upon a misreading of the court's opinion. The court plainly held that the agents' search of the aircraft on probable cause but without a warrant was justified by exigent circumstances. The search occurred in the middle of the night at a deserted airfield. Moreover, as the court noted (Pet. App. 12a-13a):

> [B]oth the car and the panel truck outside the hangar were registered to [petitioner]. Since one person cannot drive two cars at once, and since it is unlikely that one person would conduct an entire smuggling operation involving 1600 pounds of marijuana alone, the record supports the reasonableness of an inference by the agents that confederates might be present, with an attendant danger of destruction or dispersion of the evidence if the warrant procedure had been followed.

In any event, the "automobile exception" was not inapplicable here merely because petitioner had parked his airplane moments before the search. See *Scher* v. *United States*, 305 U.S. 251. As the court of appeals observed (Pet. App. 12a), the agents could have stopped and searched the plane at "any time after probable cause was generated, *i.e.*, as soon as it was identified on the taxiway." Since an attempt by the agents to do so "might have resulted in alerting [petitioner] or in injury to the officers or others present at the airport" (*ibid.*), the agents properly waited until petitioner had stopped the aircraft.

Furthermore, the fact that the motor of the airplane had been shut down and that petitioner had been arrested did not alter the vehicle's inherent mobility or destroy the reasonableness of an immediate search. As this Court has remarked, probable cause searches of vehicles without a warrant frequently "have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed was remote, if not non-existent." *Cady* v. *Dombrowski*, 413 U.S. 433, 441-442. The rationale of these cases is that there is no constitutional difference "between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers* v. *Maroney*, 399 U.S. 42, 52. Here, as petitioner concedes (Pet. 14), the agents could validly have seized the airplane without a warrant and denied anyone access to it until a search could take place. In

such circumstances, the agents acted reasonably in conducting an immediate search of the vehicle on probable cause.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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[2]There is no reason to hold this case pending the decision in *United States* v. *Chadwick*, No. 75-1721, certiorari granted, October 4, 1976, which presents the question whether the rationale underlying the so-called "automobile exception" should apply equally to other movable containers (such as a footlocker) that are lawfully in the possession of federal agents and that the agents have probable cause to believe contain contraband. Unlike a container, an airplane is virtually indistinguishable from other motor vehicles.